DATE: July 13, 1993
CASE NO. 92-ERA-51

IN THE MATTER OF

JOHN GABBRIELLI,

COMPLAINANT,

v.

ENERTECH,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the "whistleblower" provision of the Energy Reorganization Act of 1974, as amended (ERA or the Act), 42 U.S.C. § 5851 (1988), and the implementing regulations at 29 C.F.R. Part 24 (1992). After holding a hearing limited solely to the question of whether the complaint was timely filed, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R.D. and O.) on December 28, 1992, ruling that the complaint should be dismissed. Pursuant to 29 C.F.R. § 24.6(b), the ALJ's decision is now before me for review. Although afforded the opportunity, neither Complainant, who has proceeded *pro se* throughout the proceeding, nor Respondent has filed a response to the ALJ's R.D. and O. After reviewing the entire record, I agree with the ALJ's recommendation of dismissal, but modify and supplement his analysis as follows.

The ERA, as applicable in this case, provides that any employee who believes that he has been discharged or otherwise discriminated against . . . in violation . . . [of the Act] may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor . . . alleging such discharge or discrimination. 42 U.S.C.

§ 5851(b)(1). Here, Complainant filed a complaint with the Department of Labor in April 1992, alleging that he was

unlawfully terminated by Respondent in January 1989, over three years earlier. Thus, the complaint was filed well outside the statutory limitations period. Although the limitations period is subject to equitable modification, *e.g.*, *Larry v. Detroit Edison Co.*, Case No. 86-ERA-32, Sec. Dec. and Ord., June 28, 1991, slip op. at 12-19, *aff'd sub nom. Detroit Edison Co. v. Secretary, United States Department of Labor*, No. 91-3737 (6th Cir. Apr. 17, 1992), equity does not countenance this complaint.

As a threshold argument, Complainant contends that because of his personal problems and Respondent's misleading behavior, he did not realize until October 1991, that Respondent had a retaliatory motive for his "layoff." *See* Transcript (T.) at 23, 28-29, 63. Complainant testified that when he was terminated, "[i]t was my understanding that Enertech just simply didn't have the work, that should work come up, that they would contract me on an individual job basis." T. at 24-25. Complainant explained that the explanation was believable given the state of the industry. T. at 32-33. Two to three times a year, Complainant contacted Respondent's corporate quality control manager, Toni Cottrill, about new contract opportunities; was cordially told that he would be welcome to any work that became available; and was asked to leave a telephone number at which he could be contacted. T. at 16, 28, 33. Finally, however, in October 1991, Cottrill informed Complainant that she had sought approval of a new contract for Complainant with Respondent's president, but the president stated that Complainant was not to be rehired. T. at 29, 33-34. Complainant alleges that only then did he realize that Respondent never intended to rehire him and that his protected activity was the actual reason for his termination. T. at 28, 57.

While it is clear that Complainant's divorce and personal problems cannot justify his delay in filing, *see*, *e.g.*, *Christopher v. General Motors Parts Division*, 525 F. Supp. 634, 636 (E.D. Mich. 1981), *aff'd mem.*, 703 F.2d 559 (6th Cir. 1982), it is less clear whether the limitations period should be modified on account of Cottrill's assurances. The ALJ summarily found that "until October 10, 1991, Enertech lulled [Complainant] with false assurances that he would be considered for rehiring" and that, therefore, the thirty-day period began to run from October 10, 1991. R.D. and O. at 3. I disagree. [1]

Even if Cottrill made misstatements or misrepresentations on which Complainant relied to delay filing, the particular facts of this case would warrant suspension of the limitations period only until August 1990. By then, Complainant knew or should have discovered the falsity of the misstatements or the concealment

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that he alleges caused him to delay. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 879, 881-82 (5th Cir. 1991), *reh'g denied*, 1991 U.S. App. LEXIS 10415 (5th Cir. 1991), and *cert. denied*, 112 S. Ct. 198 (1991); *cf. In re Kent*, Case No. 84-WPC-2, Sec. Rem. Dec. and Ord., Apr. 6, 1987, slip op. at 11 (limitations period is tolled until "facts that would support a discrimination complaint were apparent or should have been apparent to a person with a

reasonably prudent regard for his rights similarly situated to the complainant"). This action is time barred because Complainant failed to file a complaint within thirty days thereof.

In August 1990, Complainant learned from one of Respondent's other employees that another man had been hired "almost immediately . . . to fill my vacant spot, which I was told that there was not a spot, because of lack of work." T. at 26. In view of the assertive letter Complainant wrote to Respondent prior to his termination, Complainant's Exhibit (CX) 6, and this evidence that Complainant's job was filled "almost immediately" after his layoff, I conclude that Complainant was aware of sufficient facts to support an ERA complaint. In fact, Complainant admits that he suspected discrimination, yet the record does not show that Complainant specifically confronted Cottrill or otherwise investigated this particular information. T. at 25-26; Complainant's final summation, dated October 16, 1992, at 1. Rather, even though almost two years had passed, he alleges that he continued to believe Cottrill's assurances of the possibility for reemployment. Perhaps distracted by his personal problems, Complainant simply did not act diligently to evaluate the propriety of the reason for his termination upon obtaining sufficient information to question it. *See Rhodes*, 927 F.2d at 881-82; *cf. Cada*, 920 F.2d at 451; *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561-62 (11th Cir. 1987).

Furthermore, even if I were to accept Complainant's threshold argument and find the filing period tolled until October 1991, his complaint is time barred. Complainant claims that within a week of realizing Respondent's motive for terminating him in October 1991, he contacted the resident inspector of the Nuclear Regulatory Commission (NRC), who was stationed at his current work place. T. at 29. The record verifies that Complainant provided information about "employment discrimination" and several alleged safety violations involving Respondent. CX 2. According to Complainant, the resident inspector took notes and stated that he would forward the concerns to the NRC regional office. Complainant thought that he had "initiated the process" and did not discover the proper procedure for filing an ERA complaint until March 1992, when he received a letter on an unrelated matter from the NRC. T. at 41,

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64-66.

First, this case does not fall within the narrow category of cases that permit tolling because the employee "raised the precise statutory claim in issue mistakenly in the wrong forum." *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20-21 (3d Cir. 1981); *Sawyers v. Baldwin Union Free School District*, Case No. 85-TSC-1, Sec. Dec. and Ord. of Rem., Oct. 5, 1988, slip op. at 5. In *Sawyers*, the filing period was tolled because the record showed that a timely complaint, sufficient under the whistleblower statute and the regulations at 29 C.F.R. § 24.3, had been filed with the wrong agency. There is no such documentation in evidence here. [2] Furthermore, unlike cases relying on this particular

tolling doctrine, the record does not show that Respondent "received timely notice of the specific statutory claim that was subsequently asserted" by Complainant, thereby providing Respondent with the protection which the expeditious time frame is intended to provide. *See Fox v. Eaton Corp.*, 615 F.2d 716, 719-20 (6th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981); *Hicks v. Colonial Motor Freight Lines*, Case No. 84-STA-20, Sec. Fin. Dec. and Ord., Dec. 10, 1985, slip op. at 9 n.7; *cf. Larry*, slip op. at 18; CX 2.

Next, Complainant argues that his mistake should be excused because Respondent never posted an NRC Form 3 notice of his whistleblower rights. The ALJ found that Respondent was not legally required to post the notice and that, in any event, Complainant was not entitled to tolling on this ground. R.D. and O. at 5. I need not decide the question of Respondent's legal duty to post NRC Form 3 because I agree that under the circumstances here, Respondent's failure to post cannot provide a basis for equitable modification.

The Secretary previously has addressed posting issues, relying on cases arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1982). *See Harrison v. Stone & Webster Engineering Corp.*, Case No. 91-ERA-21, Sec. Fin. Dec. and Ord., Oct. 6, 1992, slip op. at 2-4; *McNally v. Georgia Power Co.*, Case No. 85-ERA-27, Sec. Fin. Dec. and Ord., Sept. 8, 1992, slip op. at 9-10. Under the ADEA, the courts have held that an employer's failure to comply with posting requirements tolls the limitations period only unless or until the employee acquires actual or constructive knowledge of his ADEA rights, *e.g.*, until the employee acquires general knowledge of his right not to be discriminated against on account of age, or until he has the means of obtaining that knowledge, such as by viewing the informational poster somewhere outside the place of employment. *Clark v. Resistoflex Co.*, 854 F.2d 762, 768 (5th Cir. 1988); *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483, 1485-86, n.4 (11th Cir. 1984).

Here, Complainant testified, and the documentary evidence proves, that in 1988, prior to his termination by Respondent, Complainant knew that he had the right to contact the NRC concerning any problem and that he "would be protected by doing that." T. at 47-48, CX 6. Complainant was aware that an NRC Form 3 exists and covers nuclear power plant workers' rights. T. at 46, 49. Moreover, Complainant admits that NRC Form 3 is posted in his current work place and that although he did not read it, it was "part of [his] reasoning for talking to [the NRC resident inspector]." T. at 64. Thus, at the time he voiced his concerns to the inspector, Complainant had both actual and constructive knowledge of his ERA rights, and cannot rely on Respondent's failure to post as an excuse for his untimely filing.

Complainant does not otherwise claim that Respondent or the NRC resident inspector prevented him from timely filing an ERA complaint. Although Complainant may have relied on erroneous advice from his current co-workers, T. at 29, 60, the ultimate

responsibility lies with Complainant, who failed diligently to read the NRC Form 3 or to inquire further into the law. Given Complainant's actual and constructive knowledge of his statutory rights, his mere ignorance of a specific provision contained in the statute does not toll the limitations period. *See Jackson v. Richards Medical Co.*, 961 F.2d 575, 579-80 (6th Cir. 1992); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 754 (1st Cir. 1988); *cf. Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991) (ignorance of the law alone is not sufficient).

Considering all these circumstances, equitable modification is inappropriate. *See Andrews v. Orr*, 851 F.2d 146, 151-52 (6th Cir. 1988). *See also City of Allentown*, 657 F.2d at 21; *Doyle v. Alabama Power Co.*, Case No. 87-ERA-43, Sec. Fin. Dec. and Ord., Sept. 29, 1989, slip op. at 4-6, *aff'd sub nom. Doyle v. Secretary, United States Department of Labor*, No. 89-7863 (11th Cir. Nov. 26, 1991); *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295, 1303 (5th Cir. 1979).

Accordingly, the case IS DISMISSED on the basis of an untimely complaint under 42 U.S.C. § 5851. [3]

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] This is not a case in which the employer should be estopped because its promises were a quid-pro-quo for the employee's forbearance in filing a discrimination complaint, *see English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988); *Leake v. University of Cincinnati*, 605 F.2d 255, 258 (6th Cir. 1979), or because the employer deliberately attempted to mislead the employee and deter him from filing a claim, *see Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-52 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991); T. at 33; *cf. Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 810-11 (5th Cir. 1991).

[2] *Compare Pirone v. Home Insurance Co.*, 507 F. Supp. 1281, 1285 (S.D.N.Y. 1981), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983) (copy of an interview reduced to writing constitutes a charge under the ADEA).

[3] I agree with the ALJ's discussion rejecting Complainant's claims of "blacklisting" and a continuing violation. R.D. and O. at 6; *see also Janikowski v. Bendix Corp.*, 823 F.2d 945, 948 (6th Cir. 1987). I also agree that alleged

incidents occurring in September 1992, are not properly before me. R.D. and O. at 6; *see Gundersen v. Nuclear Energy Services, Inc.*, Case No. 92-ERA-48, Sec. Fin. Dec. and Ord., Jan. 19, 1993, slip op. at 7-8.